No. 80-1261

APR 22 1981

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GORDON G. GRUBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked authority to condition petitioner's probation on his resignation from union office.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A4-A6) is unreported. The judgment and probation/commitment order of the district court (Pet. App. A1-A3) also is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1980. A petition for rehearing was denied on November 28, 1980 (Pet. App. A7). The petition for a writ of certiorari was filed on January 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner, an officer of Teamsters Union Local 830 in Philadelphia, was convicted of conspiracy and making false statements to

influence loan applications, in violation of 18 U.S.C. 371, 1014 and 2 (Pet. App. A1).[1] On the first count, petitioner was sentenced to five years' imprisonment, all but three months of which was suspended in favor of probation. The district court imposed as conditions of petitioner's probation, *inter alia*, that he resign his union offices and that he not act in any capacity for any labor organization or employee benefit plan except as a business agent during the probationary period. On the second count, the district court suspended sentence in favor of a two-year probationary period to run concurrently with, and under the same conditions imposed on, the probationary period on count one (Pet. App. A1-A2). The court of appeals affirmed (Pet. App. A4-A6).

The evidence at trial, which is not disputed here, showed that, by misrepresenting that the loan was to be used for union business, petitioner obtained a loan from the union's credit union to cover his personal debts. More specifically, petitioner had been sued by the Continental Bank for defaulting on loans totalling in excess of $100,000. In January 1978, petitioner took on a higher union position and, in order to avoid embarrassment over his personal financial situation, sought to settle his outstanding debt. By the end of February 1978, a settlement was arranged whereby petitioner was to repay $50,000 within ten days (A. 49a-53a, 76a, 388a, 424a, 457a, 498a; S.A. A3).[2]

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[1]The jury found petitioner guilty on two additional counts of making false statements to influence loan applications, but the district court granted petitioner's post-trial motion for acquittal on those counts (Pet. 2).

[2]"A." refers to the appendix filed in the court of appeals. "S.A." refers to the supplemental appendix filed in the court of appeals.

On March 5, petitioner and co-defendant Vincent Improto[3] met with an officer of the Teamsters Local 830 Federal Credit Union. Improto told the officer that the Local had a problem with a lawsuit and needed $70,000 (A. 184a-185a, 203a, 377a-379a). The next evening, Improto met with the board of directors of the credit union and reiterated his story of the previous night. The members of the board approved the loan, largely because it involved their own union (A. 93a-96a, 168a-169a, 209a-211a, 284a, 295a). The credit union, in turn, borrowed the $70,000 for petitioner (A. 97a-102a, 212a, 220a, 310a-311a, 332a, 354a). On March 9, petitioner and Improto met with three members of the credit union at Teamsters Local 830 union hall. Petitioner requested two checks—one for $50,000 made payable to Continental Bank and a second, for $20,000, made payable to petitioner and Improto. Checks in the requested amounts were delivered to Improto, who endorsed the second check and turned both checks over to petitioner. Petitioner used the first check to pay the settlement on his outstanding lawsuit; he eventually cashed the second check for his own use (A. 57a-63a, 102a-106a, 221a-222a, 226a-232a, 312a-313a, 462a-467a, 504a-513a, 528a).

A routine, but unannounced, audit of the Local 830 credit union was conducted on March 16. At that time the examiner recommended that the $70,000 disbursement be recalled. Petitioner and Improto were contacted and arrangements were made for the return of the money by April 7. Petitioner obtained a personal loan from the Provident Bank and repaid the credit union on April 7 (A. 108a-110a, 115a, 120a-121a, 139a-141a, 148a-149a, 156a, 165a-166a, 239a-241a, 280a-281a, 350a, 352a, 473a-474a, 519a-521a).

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[3]Improto was tried together with petitioner and convicted on two counts, but the district court granted him a new trial, which resulted in his acquittal (Pet. 2).

During early May 1978, 14 members of Local 830 each borrowed $5,000 from the credit union. Each member, in turn, endorsed his check back to the credit union. The borrowed funds were used to purchase a $70,000 cashier's check to repay petitioner's second loan (A. 155a-157a, 243a-249a, 257a-258a, 314a-315, 319a, 381a-382a, 476a-479a, 523a-525a, 532a-533a, 549a-550a). In June 1978, Improto advised the 14 loan recipients that the money they had borrowed was for petitioner's personal use and that petitioner would repay their loans. Each month thereafter, a lump sum cash payment on the loans was made to the credit union (A. 125a-126a, 161a, 261a-264a, 297a, 384a, 527a, 556a-557a).

ARGUMENT

Petitioner contends that the district court improperly imposed restrictions on his union activity as conditions of his probation. There is no merit to this claim.

18 U.S.C. 3651 permits a district court, in a case not punishable by death or life imprisonment, "when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, [to] suspend the imposition or execution of sentence and place the defendant on probation for such period *and upon such terms and conditions as the court deems best*" (emphasis added). The purpose of the statute is to permit rehabilitation without incarceration. See *Roberts* v. *United States*, 320 U.S. 264, 272 (1943); *United States* v. *Murray*, 275 U.S. 347, 357 (1928). The courts of appeals have held that the only limitation upon a sentencing court's discretion to impose conditions on probation is that the conditions bear a reasonable relationship to the rehabilitation of the accused and the protection of the public. See, *e.g.*, *United States* v. *Tonry*, 605 F. 2d 144, 148 (5th Cir. 1979); *United States* v. *Consuelo-Gonzalez*, 521 F. 2d 259, 264 (9th Cir. 1975) (en banc); *Porth* v. *Templar*, 453 F. 2d 330, 333 (10th Cir. 1971).

Petitioner contends, however, that the customarily broad discretion of district courts to impose conditions of probation was preempted with respect to the holding of union office by the enactment of 29 U.S.C. 504 and 1111, which prohibit individuals convicted of certain offenses from holding certain union or employee benefit plan offices or positions. Since the offenses for which he was convicted do not, according to petitioner, give rise to disqualification under those statutes,[4] he contends that the district court was not empowered to condition his probation on his resignation from union office. The flaw in petitioner's reasoning, however, is that while 29 U.S.C. 504 and 1111 *require* the curtailment of union activities of persons convicted of the offenses enumerated in those statutes, nothing in those statutes (or anywhere else) *prevents* a sentencing court from employing its usual broad discretion to impose such restrictions as a condition of probation in the case of one convicted of an offense not listed in the statutes.

Prior to the enactment of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*, of which Section 504 is a part, and 29 U.S.C. 1111, imposition of the following condition was upheld: that " 'during the term of probation the defendant shall not directly or indirectly hold any office in or employment by any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent defendant from being a member of any labor organization.' " *Berra* v. *United States*, 221 F. 2d 590, 598 (8th Cir. 1955), aff'd on other grounds, 351 U.S. 131 (1956). Petitioner points neither to anything in the language or legislative history of the LMRDA nor to any judicial authority suggesting that the LMRDA deprives sentencing courts of the broad discretion

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[4]It is by no means clear that petitioner's conviction for making false statements to influence a loan application and conspiring to do so are not included within the offense of "fraud" listed in 29 U.S.C. 1111.

conferred on them by 18 U.S.C. 3651 to impose probationary "terms and conditions as [they] deem[] best." Indeed, such a holding would be inconsistent with the Congressional purpose to protect unions from dishonest officials.[5]

The cases relied on by petitioner (Pet. 6-7) deal with quite different types of probation conditions and do not conflict with the decision here. Those cases stand for the proposition that where there exist alternative and well-defined procedures for imposing a penalty on a defendant, which procedures would afford the defendant substantial protections not available to him were the penalty imposed as a condition of probation, imposition of a particular condition of probation may be improper. In *United States* v. *Hernandez*, 588 F. 2d 346, 350-352 (2d Cir. 1978), a special parole term of 25 years conditioned on a narcotics defendant's leaving the country upon his release from prison and not returning during the parole term was held to be equivalent to deportation, which is entrusted to the Attorney General and beyond the authority of the district court to impose. *United States* v. *Pastore*, 537 F. 2d 675, 683 (2d Cir. 1976), questioned a condition of probation requiring an attorney convicted of an income tax offense to resign his membership in the bar. The court found the condition to be equivalent to expulsion from the state bar, which "is a sanction precisely governed by statute and regulation."[6]

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[5]Nor does petitioner's reliance (Pet. 5) on *Wirtz* v. *Hotel, Motel & Club Employees*, 391 U.S. 492 (1968), aid him. In that case, the Court invalidated a local bylaw, recognizing that "the congressional concern to avoid unnecessary intervention [in internal union affairs] was balanced against the policy expressed in the [Labor-Management Reporting and Disclosure] Act to protect the public interest * * *" (*id.* at 496). See also *id.* at 497 (Congressional recognition of the need to protect the rank-and-file members against corruption).

[6]In *Pastore*, the probationary condition was held invalid not only because the practice of law was regulated by the state, but also because the requirement was unduly harsh, entailing consequences that might last for the defendant's lifetime, not merely the three years of probation.

United States v. *Castillo-Burgos*, 501 F. 2d 217, 219-220 (9th Cir.), cert. denied, 419 U.S. 1010 (1974), similarly concluded that a sentencing court has no authority to condition a marijuana offender's probation on his permanent deportation.

Each of these cases on which petitioner relies depends on the existence of a comprehensive procedure to deal broadly with a particular collateral consequence of a conviction. Here, however, accepting arguendo petitioner's contention that neither Section 504 nor Section 1111 covers his offense, no alternative forum is available to consider whether petitioner should be temporarily barred from holding union office. The alternative procedure relied on by petitioner in this case—administrative review by the Board of Parole—is a means of removing, not imposing, the statutory disability, and it of course is available only in those classes of cases covered by the statutes.

Petitioner's conviction arose directly out of his misuse of his union office, and the district court was properly concerned that petitioner had abused his fiduciary position for his own financial gain (S.A. A23). Accordingly, it fashioned probationary conditions that would remove petitioner from any position in which he could readily influence the union's financial affairs to his personal benefit during the period of his probation. At the same time, the court permitted petitioner to function as a business agent for the union, thus preserving his ability to aid the union in contract bargaining sessions (*id.* at A24-A25). These conditions were carefully designed both to protect the union and to further petitioner's rehabilitation.

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537 F. 2d at 682-683. See also *United States* v. *Tonry*, *supra*, 605 F. 2d at 149. Here, by contrast, petitioner must only surrender his union offices for the probationary period, and he is not deprived of his means of livelihood, namely, working for the union as a business agent (see S.A. A25).

Similar restrictions on otherwise lawful activities have been approved by other courts of appeals. See, *e.g.*, *United States* v. *Tonry, supra* (probation of defendant who pleaded guilty to four misdemeanor violations of the Federal Election Campaign Act may be conditioned on his not running for political office or engaging in political activity during probationary period); *United States* v. *Villarin Gerena*, 553 F. 2d 723, 726-727 (1st Cir. 1977) (probation of police officer convicted of violating 18 U.S.C. 242 may be conditioned on his resignation from police force); *United States* v. *Bishop*, 537 F. 2d 1184, 1186 (4th Cir. 1976), cert. denied, 429 U.S. 1093 (1977) (probation of one convicted of conspiracy to violate the Internal Revenue Code may be conditioned on his not frequenting racetracks or other types of gambling establishments and not placing bets of any kind); *Malone* v. *United States*, 502 F. 2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (probation of one convicted of unlawful exportation of firearms from the United States to the United Kingdom may be conditioned on his not participating in any American Irish Republican movement and not accepting employment that directly or indirectly would associate him with any Irish organization or movement). There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

DOJ-1981-04